

New Castle County -- Civil Division

July 11, 2005

J. Paul Jones, P.E.
President, Council of the Delaware Association of Professional Engineers
56 W. Main Street, Suite 208
Christiana, DE 19702

Re: Protection of Complainants

Dear Mr. Jones:

By your letter dated April 1, 2005 to the Attorney General, you asked (1) whether 24 *Del.C.* § 2813(b) affords legal protection by the Office of the Attorney General for any member of the Delaware Association of Professional Engineers (“Association”) who files a complaint; (2) if Council were aware of a concern regarding retribution for filing of a complaint, whether the Office of the Attorney General would provide legal defense representation under the current Section 2813(b), if Council appointed the potential complainant to the Law Enforcement and Ethics Committee (“LE/E”) prior to the complaint being formally filed; (3) how can Section 2813(b) be modified to effect such protection; and (4) finally, would the Office of the Attorney General support such legislation. This letter responds to these questions.

Briefly, our Office concludes (1) it is likely to be construed that 29 *Del.C.* § 2813(b) does not apply to those Association members who are neither members of the Council nor employed or appointed by the Council; (2) legal representation by this Office would depend upon specific facts and circumstances when considering Section 2813(b) in conjunction with other provisions of Delaware law; (3) there is an existing common law privilege afforded to a complaining witness against civil suits for defamation, and the Council can decide whether or not it wants to pursue such legislation; and (4) this Office is available to work with the Council in the preparation of legislation and review such proposal with respect to other agencies in the intervening time between sessions of the General Assembly. Each issue is discussed in further detail below.

First, the issue is whether 24 *Del.C.* § 2813(b) is likely to be construed to provide some form of legal protection to any Association member who files a complaint where a member is ethically obligated under the Code of Ethics to make such complaints.¹ Our Office concludes a court is likely to construe that 29 *Del.C.* § 2813(b) does not apply to those Association members who are neither members of the Council nor employed or appointed by the Council.

Section 2813(b) appears unambiguous on its face and not in need of further

¹ DAPE Code of Ethics 1.D. provides, in part, “The engineer having knowledge of *any alleged violation of the Code of Ethics* shall be forthright and candid in cooperating with the Council in furnishing such information or assistance as may be required.” (emphasis added).

interpretation.² “If a statute is unambiguous, there is no need for judicial interpretation, and the plain meaning of the statutory language controls.” *Director of Revenue v. CNA Holdings, Inc.*, 818 A.2d 953, 957 (Del. 2003); *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242 (Del. 1985). Under this section, the Attorney General can provide legal representation in civil cases arising out of the performance of official duties for the State to three subsets of potential State defendants: (1) the Council as a legal entity, (2) any individual member of the Council, and (3) at the express request of the Council, any employee or appointee of the Council. The statute makes no mention of Association members generally, or Association members or members of the public filing complaints specifically. Given this fact and the inference required by law, it is likely to be construed that 29 *Del.C.* § 2813(b) does not apply to those Association members who are neither members of the Council nor employed or appointed by the Council.

Second, the issue is whether this Office would provide legal defense representation under the current Section 2813(b), if Council were aware of a concern regarding retribution for filing of a complaint and the Council appointed the potential complainant to the LE/E Committee prior to the complaint being formally filed. This Office concludes that representation by this Office would depend upon the facts and

² Section 2813(b) provides, “The Attorney General shall represent the Council, any Council member, and at the express request of the Council, any person appointed or employed by the Council in a civil action against such person arising from services for the State of Delaware. If any Attorney General determines he is unable to represent the Council, or any Council member or any person whom he is requested by the Council to represent, and in all criminal actions, section 3925 of Title 10 of the Delaware Code shall apply.”

circumstances when considering Section 2813(b) in conjunction with other provisions of Delaware law.

This issue is also a matter of statutory construction. Section 2813(b) explicitly covers “any person appointed or employed by the Council.” Further, Section 2813(b) is subject to this Office determining whether it is unable to represent the Council, or any Council member or any person as requested by the Council, and in such a determination and in all criminal actions, the provisions of 10 *Del.C.* § 3925 apply. In applying statutory construction principles, § 2813(b) is plain and provides no exceptions. *State v. Holland*, 189 A.2d 79, 82 (Del. Super. 1963).

Further, representation by this Office would depend upon the facts. In addition to Section 2813(b), this Office has authority to

to represent witnesses for the State or individuals who have cooperated with state investigative agencies when they are sued as a result of, or on account of, their cooperation with any agency of the State in any investigation or prosecution conducted by the State unless such representation creates a conflict with the interests of the State.

29 *Del.C.* § 2504(9). In *Horstmann v. Re*, 485 A.2d 590 (Del. 1984), the court concluded the Office of the Attorney General could represent two private citizens sued for damages arising out of their cooperation with a state investigation, unless such representation created a conflict with the State’s interests under § 2504(9). The court considered the specific facts and surrounding circumstances of that case in determining that no conflict existed for representation by this Office. In that case, two citizens caused an

investigation to be instituted by the State Department of Justice and Division of Consumer Affairs against three individuals for various violations of Delaware's security laws. The court also considered, in that case, the terms of a cease and desist order entered against two of the three individuals. The cease and desist order contained a general release that released and discharged the two citizens from all claims resulting from the investigation in which the citizens participated with the State. *Id.* at 591.

Third, the issue is how Section 2813(b) can be modified to effect such protection. Our Office concludes there is an existing common law privilege afforded to a complaining witness against civil suits for defamation and it is a policy decision for the Council as to whether or not it wants to pursue such legislation.

A complaining witness enjoys a qualified privilege shielding him from an action for defamation relating to a communication made between "persons with a common interest for the protection of which the allegedly defamatory statements are made," so long as the person making the accusation did not know the allegation was false or acted in reckless disregard of the truth. *Layfield v. Beebe Medical Center, Inc., et al.*, 1997 WL 716900 (Del. Super.). In that case, a former nurse employed by Beebe Medical Center filed a defamation suit against Beebe and a treating physician for making allegations about a possible practice violation to the Delaware Board of Nursing, which the Board chose not to prosecute. The complaint failed given this common law privilege, because the court found that both Beebe and the Board shared a common interest in the competence and professionalism of nurses practicing in Delaware.

As a matter of policy, the Council may choose to seek legislation codifying protection. If it decides to do so, the Council could look to other statutory provisions for possible guidance. *See, e.g.*, 24 *Del.C.* § 506 (Delaware Board of Podiatry); 24 *Del.C.* § 706 (Delaware Board of Chiropractic); 24 *Del.C.* § 1768 (Delaware Board of Medical Practice); 24 *Del.C.* § 1191 (Delaware Board of Dental Examiners); 24 *Del.C.* § 2556 (Delaware Board of Pharmacy); 29 *Del.C.* § 8807(n)(11) (immunity provision concerning reports made pursuant to that section).

Fourth, the issue is whether this Office would support the Council's potential legislative efforts to codify such protection. This Office is available to work with the Council in the preparation of such legislation and review any such proposal with respect to other agencies in the intervening time between sessions of the General Assembly.

In summary, our Office concludes (1) it is likely to be construed that 29 *Del.C.* § 2813(b) does not apply to those Association members who are neither members of the Council nor employed or appointed by the Council; (2) legal representation by this Office would depend upon specific facts and circumstances when considering Section 2813(b) in conjunction with other provisions of Delaware law; (3) there is an existing common law privilege afforded to a complaining witness against civil suits for defamation, and the Council can decide whether or not it wants to pursue such legislation; and (4) this Office is available to assist the Council in the preparation of such legislation and review such proposal with respect to other agencies.

J. Paul Jones, P.E.
July 11, 2005
Page 7

Please do not hesitate to contact us if you have any questions.

Very truly yours,

Laura L. Gerard
Deputy Attorney General

APPROVED:

Malcolm S. Cobin
State Solicitor

cc: The Honorable M. Jane Brady
Philip G. Johnson, Opinion Coordinator